except when the respondent comes to live permanently with the children; and (e) the respondent had to pay the appellant a monthly allowance of $1,500 and to provide her with the car for the purpose of the children's education and well-being. Thus if she decides to live elsewhere, even though she is free to do so under the agreement, she has in fact and law discharged herself from the obligation to look after the children, and that being the case, there is no reason either in law or in equity why she should still be entitled to those allowances and a car, the benefits of which are meant obviously for the children. She turns round and says that she is not in a position to discharge her responsibility towards the children because the respondent has failed to pay her the allowances and to provide her with a car. The answers to this argument, as I have stated earlier, is that not only does the deed make no provision in the event the appellant lives apart from the children, but the very fact of her living away from them and the assumption of responsibility by the respondent towards the children is contrary to the purpose and spirit of the agreement and militates towards her ability to discharge her undertaking towards the children.

Further, the defence set up by the respondent is that during those weekends in the period between September 1975 and April 1976 when he came home from Singapore to stay with the children, he and the appellant co-habited as husband and wife, and therefore this liability for which the appellant sued him by virtue of Clause 3(b) had ceased to exist. The question whether the party co-habited or not is a question of fact. There is only the oral evidence of the appellant to the effect that at no time had she co-habited with the respondent. However, there are circumstances disclosed in the cross-examination which would lead to an inference or finding of facts, if a trial is held, that the parties had resumed co-habitation. As this is not a trial, I had no opportunity to hear the evidence of the respondent in support of his defence. Therefore, whether or not the respondent was liable to pay the sums claimed depends on the proof as to his co-habiting or not co-habiting with his wife.

The respondent also alleged that the appellant had committed a breach of the agreement for pledging the credit of the respondent contrary to Clause 2(a) of the deed, thereby causing him to incur certain expenses amounting to $906.30 for which the appellant in breach of the deed failed to indemnify him. This allegation has not been controverted by the appellant apart from the counsel's statement from the bar that he had no knowledge of it.

To my mind, the defences put up by the respondent both in law and facts are by no means sham or immaterial. They are substantial and even demolish the very case of the appellant itself, and if I may say so, they reduce the appellant's case to a sham one. I therefore hold that there are triable issues and as such I dismissed the appellant's application for Order 14 rule 1.

Application dismissed.

Solicitors: *James Foong & Co.; Allen & Gledhill.*

MOHAMED NOH BIN YAAKOB & ANOR. v. HAJI MOHAMED NOOR BIN HAJI YAKUB

[A.C.J. (Syed Agil Barakbah J.) March 5 & May 13, 1979]
[Alor Star — Civil Appeal No. 5 of 1978]

Practice and Procedure — Jurisdiction — Judgment in default — Whether President of Sessions Court could set aside Judgment in default made by his predecessor — Subordinate Court Rules 1950, O. II, O. XIX r. 3(3), O. XXXVI r. 19 — R.S.C. 1957, O. 13 r. 10, O. 27 r. 15, O. 36 r. 33.

This is an appeal against the decision of the learned President, Sessions Court on a point of law which he decided that he had no jurisdiction to set aside judgment in default made by his predecessor against the appellants for failing to appear during the proceeding. In the lower court, the appellants contended that they knew about the case only when a judgment notice was served on them.

Held: (1) no President or Magistrate can set aside a final judgment unless allowed by statute. The only remedy is to file an appeal against judgment;

(2) in the present case where the judgment entered against the defendant was in default of him being present in court during the hearing, by virtue of Order XIX rule 3(3) and Order XXXVI rule 19 of the Subordinate Courts Rules, the succeeding President or Magistrate might hear and if satisfied on the merits of the application, set aside the judgment of the predecessor.

Cases referred to:-

(1) *Nacheeppia Chettiar* v. *Gan Eng Kiat* [1965] 2 M.L.J. 25.

(2) *Arjan Singh* v. *Hashim Angullia & Ors.* [1941] M.L.J. 55.

(3) *L.W. Cyris* v. *K.G.A. Gunadasa* [1955] M.L.J. 7.

CIVIL APPEAL.

A. Jayadeva for the appellants.

Kartar Singh for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah J.: This is an appeal against the decision of the learned President, Sessions Court, Alor Star, on a point of law which he raised as a preliminary issue and decided that he has no jurisdiction to set aside the judgment in default made by his predecessor against the appellants for failing to appear during the proceeding. The judgment given against the appellants (defendants in the court below) was for the surrender forthwith of vacant possession of certain land on the ground that they were trespassers and for payment of damages in the sum of $2,305 and costs. The order was issued on January 10, 1976. On August 16, 1977, the appellants filed the application to set as.de the said judgment. The accompanying affidavit, *inter alia,* states that the summons was not served on the appellants. All that they knew about the case was when a judgment notice was served on them on or about July, 1977.

The judgment in default was made by the former President, Encik Haidar. When he went on transfer the present President, Encik Yusof Khan succeeded him. He held that he has no jurisdiction to hear the application. He relied on the judgment of Suffian J., (as he then was) in *Nacheeppia Chettiar* v. *Gan Eng Kiat.*[1] It was held that a President of a Sessions Court has no power to set aside the judgment of his predecessor.

A number of authorities were cited before the learned President who concluded that the facts in the

present case are not distinguishable from *Nacheeppia's* case and the *ratio decidendi* of Suffian J., (as he then was) is of general application and applies to all cases where judgment is given, whether by default, by consent or a full judgment on merits.

In the light of the above, it is therefore necessary for me to scrutinise the judgment and refer to other relevant authorities and the court rules in order to decide whether the learned President is right.

Nacheeppia's case concerns a judgment by consent of the defendant who appeared in court and admitted the plaintiff's claim for money due and owing on a promissory note. It appeared the plaintiff had not produced a statement of accounts at the time of suing and the pro-note had not been attested. That contravened the provisions of the Moneylenders Ordinance. The learned President who had entered judgment earlier had been transferred and the succeeding President set aside the judgment but subsequently had misgivings and referred the matter to the High Court for revision under section 32 of the Courts of Judicature Act, 1964. *Nacheeppia's* case is distinguishable from *Arjan Singh* v. *Hashim Angullia & Ors.*,[2] also a claim for non-compliance with the provisions of the Moneylenders Ordinance similar to the former. The defendants did not admit the plaintiff's claim but applied to the court to set aside the writ of summons on the ground of non-compliance by the plaintiff with the statutory provisions. The summons was accordingly set aside. The third case worthy of note is *L.W. Cyris* v. *K.G.A. Gunadasa*[3] which was an appeal to the High Court against the refusal of the President, Sessions Court, to set aside judgment given in default in the absence of the appellant. A written defence filed before the application disclosed a good defence on the merits. The judgment was set aside. The original judgment in default and the refusal to set it aside was made by the same President who sat as a Magistrate.

Now, the power of the High Court or a judge to set aside judgment by default is provided by Order 27 rule 15,, judgment by default of appearance by Order 13 rule 10 and judgment obtained in the absence of the opposite party at the trial by Order 36 rule 33 of the Rules of the Supreme Court. It is to be noted that in all these rules discretionary power to set aside the interlocutory judgment is given to the court or a judge. If an order for judgment has been made or judgment entered, either in default of appearance to the writ or delivery of pleading or of appearance at the trial, the court or a judge may set it aside upon such terms as to costs and otherwise as the court or a judge may think fit. (See *Halsbury's* Laws of England, 3rd Edition, Volume 22, page 788, paragraph 1667). I understand that to mean the exercise of such power is not limited only to the judge who has given the judgment but any judge of the High Court who succeeds him or presides in the absence or in place of the former.

In the case of the Sessions and Magistrates' Courts, Order XIX rule 3(3) of the Subordinate Courts Rules, 1950, provides:—

"Any judgment or order given or made in the absence of a party may, on his application and if good reason for such absence be shown, be set aside and the proceedings may be reheard upon such terms as to costs or otherwise as the court shall think fit. Notice of such application shall be given to the opposite party."

The rule should be read with Order XXXVI rule 19 which does not limit the inherent power of the court to make such orders as may be necessary to prevent injustice or prevent abuse of the process of the court.

The word "Court" appearing in both rules as defined in Order II is wide enough to enable the exercise of the power by the court of competent jurisdiction, i.e. by any President or Magistrate. Presidents and Magistrates, as in the case of the present appeal, often go on transfer and may cease to have jurisdiction. They will not therefore be in a position to perform their judicial functions. Secondly, it will involve time and unnecessary expenses.

With great respect, I think *Nacheeppia's* case refers to a full or final judgment because the defendant appeared in person and admitted the plaintiff's claim. Thereupon an order was entered and perfected. No President or Magistrate can set aside a final judgment unless allowed by statute. Order XIX rule 3(3) of the Subordinate Courts Rules does not therefore arise. The only remedy is to file an appeal against the judgment. Thus Suffian J., (as he then was) stated that the defendant should not have admitted the plaintiff's claim at the time of hearing, if he wanted to avail himself of *Arjan Singh's* case. He should have applied to have the summons set aside to enable the President to act on the authority of that case. He did not do so nor did he file any appeal against the judgment.

In the circumstances I hold that in the present case where the judgment entered against the defendant is in default of him being present in court during the hearing, by virtue of Order XIX rule 3(3) and Order XXXVI rule 19 of the Subordinate Courts Rules, the succeeding President or Magistrate may hear and if satisfied on the merits of the application, set aside the judgment of his predecessor.

Order accordingly.

Solicitors: *Jayadeva & Kamal; Kartar Singh Dhaliwal & Co.*